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10 *TAE K. KAI, Trustees of the Kai Family 1998 Trust*

11 **UNITED STATES BANKRUPTCY COURT**

12 **NORTHERN DISTRICT OF CALIFORNIA**

13 **SAN JOSE DIVISION**

14 In re:

15 MICHAEL HAROUTUN MIROYAN,

16 Debtor.

Case No.: 18-52601-MEH

Chapter 13

Confirmation Hearing

Date: January 25, 2019

Time: 9:55 a.m.

Court: 3020, Hon. M. Elaine Hammond

17 **OBJECTION TO PLAN**

18 Kai Family 1998 Trust Dated October 5, 1998 (“Kai Trust”), objects to the Chapter 13 Plan
19 dated December 6, 2018 (“Plan”) filed by Michael Haroutun Miroyan (“Miroyan”), the Debtor in the
20 above-captioned Chapter 13 case, on the grounds both this Chapter 13 case, and the Plan, have been
21 filed in bad faith.

22 The Court is requested to take judicial notice¹ of the Kai Trust’s Motion for Relief from Stay
23 and supporting Declaration of Kenneth Y. Kai, together with all exhibits thereto (“Kai Decl.”) (filed
24 on December 29, 2018, Docket No. 24)(“RST Motion”), as well as Miroyan’s bankruptcy schedules
25 (filed on December 10, 2018, Docket No. 13)(“Schedules”), filed in this bankruptcy case.

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27 ¹ Rules 201(b) and 201(d) of the Federal Rules of Evidence, which are made applicable to this
28 proceeding by Rule 9017 of Federal Rules of Bankruptcy Procedure.

1 The RST Motion concerns a judicial foreclosure in Civil Action No. 15-1-0164K in the
2 Circuit Court of the Third Circuit State of Hawaii ("Civil Action") of an undeveloped lot located in
3 Hawaii, identified in Miroyan's bankruptcy schedule A/B, Item 1.4 as: "Empty Land in HI, Lot: 3-6-
4 8-002-053," referred to herein as "Parcel 53." Parcel 53 was previously owned by Hawaiian
5 Riverbend, LLC ("HR LLC"), Miroyan's single member LLC and former Chapter 11 debtor in the
6 U.S. Bankruptcy Court for the District of Hawaii, Case No. 16-00348, until Miroyan caused HR LLC
7 to fraudulently transfer Parcel 53 to himself for no consideration on or about August 9, 2018 (Exhibit
8 "A" to the RST Motion). HR LLC is the obligor on promissory notes secured by Parcel 53 in favor
9 of the Kai Trust, all of which are in default and on which the Kai Trust alleges the balance due is
10 \$1,053.453.42.

11 The Kai Trust contends that by transferring Parcel 53 from HR LLC to himself for no
12 consideration and then filing for Chapter 13 bankruptcy, Miroyan engaged in bad faith conduct
13 designed to hinder, delay and/or defraud the Kai Trust.

14 The bankruptcy code imposes two independent good faith obligations on a chapter 13 debtor
15 at 11 U.S.C. §§1325(a)(3) and (a)(7).² First, Code §1325(a)(3) requires that "the plan has been
16 proposed in good faith and not by any means forbidden by law." And, Code §1325(a)(7) requires that
17 "the action of the debtor in filing the petition was in good faith."

18 In determining whether a petition or plan is filed in good faith the court must review the
19 "totality of the circumstances." *In re Khan*, 846 F.3d 1058, 1065 (9th Cir. 2017); *Leavitt v. Soto*, 171
20 F.3d 1219, 1224-25 (9th Cir.1999). The Ninth Circuit did not decide with precision what qualifies as
21 bad faith, but emphasized that the debtor's conduct must in fact be atypical. *Rosson v. Fitzgerald (In*
22 *re Rosson)*, 545 F.3d 764, 773 (9th Cir. 2008), quoting *Marrama v. Citizens Bank of Massachusetts*,
23 549 U.S. 365, 127 S.Ct. 1105, 1112, 166 L. Ed. 2d 956 at n. 11 (2007).

24 In *Leavitt*, 171 F.3d at 1224, the Ninth Circuit held that in determining whether a chapter 13
25 plan was proposed in good faith, a bankruptcy court should consider (1) whether the debtor
26 misrepresented facts in his or her petition or plan, unfairly manipulated the Code, or otherwise filed
27 his or her petition or plan in an inequitable manner; (2) the debtor's history of filings and dismissals;

28 ² Further references to Title 11 of the U.S. Code are abbreviated as the "Code."

1 (3) whether the debtor intended to defeat state court litigation; and (4) whether egregious behavior is
2 present. These four factors are not all-inclusive, and the court need not find that every factor is
3 shown by the evidence in order to conclude that bad faith has been shown. See, *In re Ewing*, 583
4 B.R. 252, 261 (Bankr. D. Mont. 2018)

5 Analysis of Miroyan's scheme under the *Leavitt* factors supports the Kai Trust's bad faith
6 objection. First, Miroyan appears to have misrepresented material facts in his Schedules. For
7 example, the Statement of Financial Affairs, Item 10., states Parcel 53 was foreclosed in September,
8 2018 by Cory Tereick, and valued at \$17,000,000. But according to HR LLC's Chapter 11 Plan,
9 Cory Tereick did not have a lien on Parcel 53. (See Kai Decl., Exhibit 7, p.113³). Bankruptcy
10 Schedule A/B (Item 1.4) shows Miroyan as the current owner of Parcel 53, with a value of
11 \$4,500,000. Similarly, Bankruptcy Schedule "D" shows the Kai Trust as fully secured creditors
12 (Items 2.1 and 2.2) in the total amount of \$790,000 with respect to Parcel 53.

13 Second, Miroyan has a history of misusing the Code by filing the Chapter 11 case for HR
14 LLC, confirming a Plan, and then deliberately failing to perform on the Plan. (See Kai Decl., Exhibit
15 8, p. 152)

16 Third, Miroyan filed this Chapter 13 for the sole purpose of preventing the foreclosure sale of
17 Parcel 53 (See Kai Decl., Exhibit 11, p. 167), the same way he filed the HR LLC Chapter 11 two
18 days before the hearing on the Kai Trust's motion for summary judgment in the Civil Action.⁴

19 Finally, Miroyan engineered the fraudulent transfer of Parcel 53 from HR LLC to himself for
20 no consideration (See RST Motion, Exhibit "A"), and then filed this Chapter 13 case to take
21 advantage of the automatic stay, thereby continuing his scheme to use the Bankruptcy Code to
22 frustrate the Kai Trust's efforts to foreclose on Parcel 53, all the while never having made a single
23 payment to the Kai Trust. ("Kai Decl., ¶¶11, 23) By misusing the Bankruptcy Code, Miroyan has
24 managed to delay the Kai Trust's foreclosure on Parcel 53 for more than 3-1/2 years. (RST Mot.,
25 p.6:12 – 16, n.3)

26 While application of the *Leavitt* factors frames the inquiry, "the court is not obligated to count
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28 ³ Page numbers refer to "Kai Decl. Exhibit P. xxx."

⁴ The hearing on the motion for summary judgment in the Civil Action was set for April 6, 2016.

the four *Leavitt* factors as though they present some sort of a box-score, but rather is to consider them all and weigh them in judging the 'totality of the circumstances.'" *In re Lehr*, 479 B.R. 90, 98 (Bank. N.D.Cal. 2012). "The bankruptcy court is not required to find that each [*Leavitt*] factor is satisfied or even to weigh each factor equally." *Khan v. Curry (In re Khan)*, 523 B.R. 175, 185 (9th Cir. BAP 2014). Rather, "[t]he *Leavitt* factors are simply tools that the bankruptcy court employs in considering the totality of the circumstances." *Id.*

Given the totality of the circumstances and undeniable bad faith, this Court should deny confirmation of the Plan and consider dismissal or conversion of Miroyan's bankruptcy case.

Dated: December 31, 2018

/s/ Wayne A. Silver

Wayne A. Silver, attorney for *KENNETH Y. KAI and TAE K. KAI, Trustees of the Kai Family 1998 Trust*

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I am the attorney for KENNETH Y. KAI and TAE K. KAI, Trustees of the Kai Family 1998 Trust, with offices at 643 Bair Island Road, Suite 403, Redwood City, CA 94063. On December 31, 2018 I caused to be served true and correct copies of the OBJECTION TO PLAN by means of this Court's electronic transmission to the Notice of Electronic Filing through the Court's transmission facilities, to the parties and/or counsel who are registered CM/ECF users set forth on the ECF/CMS Mailing List obtained from this Court, as follows:

In addition on this date, I served the foregoing document on Debtor MICHAEL HAROUTUN MIROYAN, by placing a true and correct copy thereof enclosed in a sealed envelope, with first-class postage thereon fully prepaid, addressed to:

and depositing said envelope for mailing with the U.S. Postal Service at Henderson, Nevada.

/s/ Wayne A. Silver
Wayne A. Silver